LIBRARY
SUPREME COURT, U. S.

JUN 22 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1[redacted]280

WILLIAM DAVIS KENNEY,
Petitioner,

v.

PANCAKE KITCHENS, INC., ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

ROBERT M. ALEXANDER
1829 Columbia Pike
Arlington, Virginia 22204

Attorney for Petitioner

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 2

THE QUESTIONS PRESENTED 2

CONSTITUTIONAL PROVISIONS INVOLVED 3

REASONS FOR GRANTING THE WRIT 3

CONCLUSION 3

APPENDICES:

A. Petition for Compensation – Injury A1

B. Opinion by HARWOOD, Commissioner, January 5, 1966 ..... A3

C. Application for Rehearing A3

D. Opinion by HARWOOD, Commissioner, November 16, 1966 ..... A5

E. Petition for Rehearing or Review Before the Full Commission or Certification of Questions of Law to the Supreme Court of Appeals A7

F. Opinion of Full Commission, January 5, 1967 ..... A7

G. Petition for Appeals A8

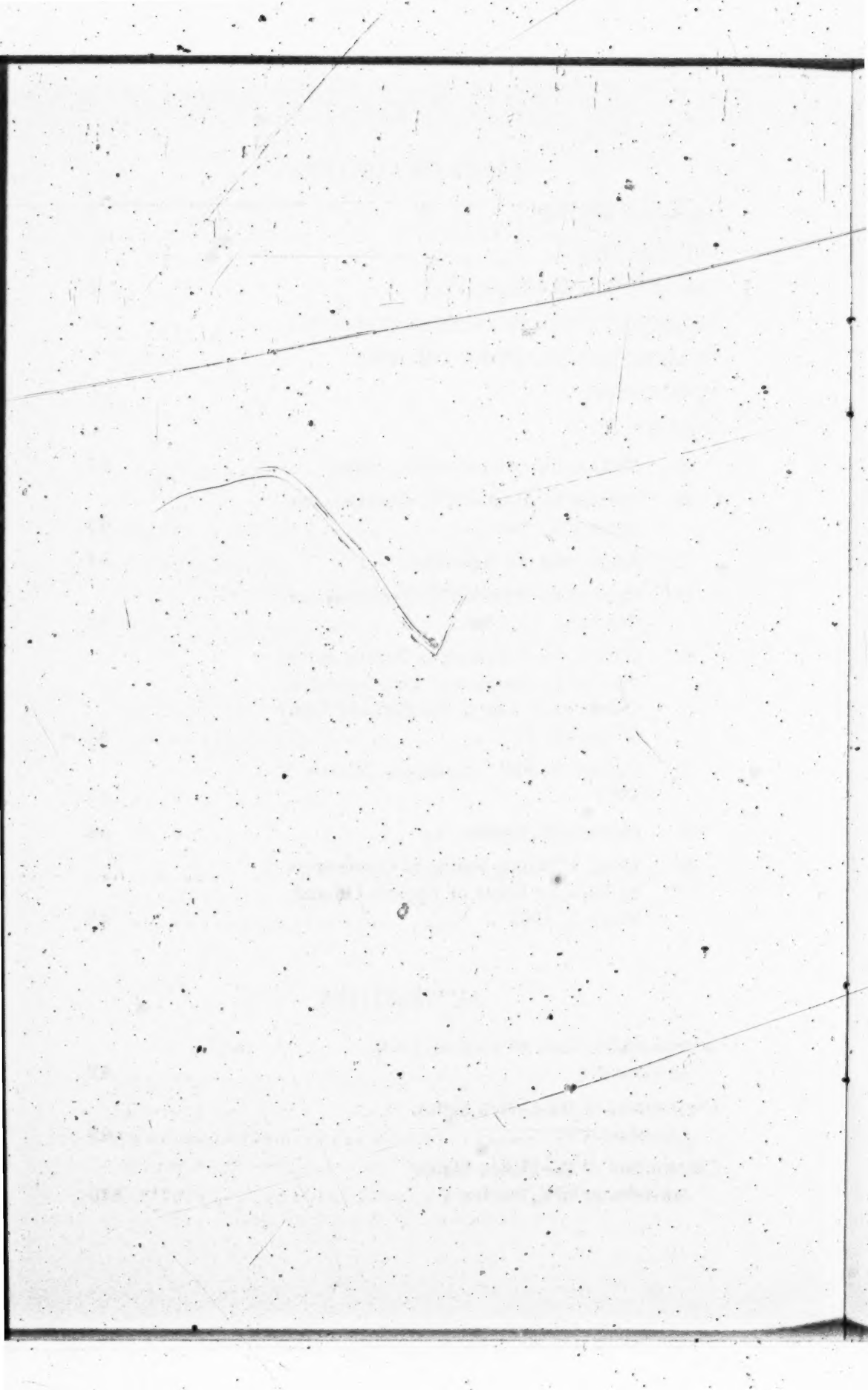
H. Order Affirming Ruling of Commission by Supreme Court of Appeals Entered March 7, 1967 ..... A9

AUTHORITIES

Section 65-84, Code of Virginia, 1950, As Amended A9

Constitution of the United States, Amendment V A9

Constitution of the United States, Amendment XIV, Section 1 ..... A10



IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

WILLIAM DAVIS KENNEY,
Petitioner,

v.

PANCAKE KITCHENS, INC., ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

Petitioner William Davis Kenney prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Appeals of Virginia of March 7, 1967, affirming the Industrial Commission's dismissal of a minor Petitioner's claim for benefits for disabling injuries under The Workmen's Compensation Act as being untimely filed.

OPINIONS BELOW

Petitioner William Davis Kenney was born April 12, 1945. He was injured on his job on June 12, 1965 when he was 20 years of age. He filed, by counsel, a claim for benefits under The Workmen's Compensation Act before the Industrial Commission of Virginia on June 28, 1965, for disabling injuries arising out of his accident. A hearing was set for

December 30, 1965. The minor Petitioner was on a sojourn in Florida and did not appear. His counsel appeared for him and requested a continuance. The Respondents objected to a continuance and moved for a dismissal of the claim for failure to appear and want of prosecution. The motions were taken under advisement by the Examiner and on January 5, 1966, the following decision was rendered:

> "This case, which is before us upon the claimant's application, is ordered dismissed and removed from the hearing docket for the failure of the claimant to appear and prosecute the case.
>
> "Leave is granted the claimant to reapply for a hearing if such application is made in writing and filed with the Industrial Commission within the time provided by Section 65-84, Code of Virginia.
>
> "Dismissed, with leave to reinstate."

On July 15, 1966, Petitioner, by counsel, filed an "Application for Rehearing" to have the claim docketed and heard. The claim was dismissed on the grounds the claim was not filed within one year after the accident and is forever barred. This judgment was affirmed by the Supreme Court of Virginia.

JURISDICTION

The Order affirming dismissal of Petitioner's claim was entered March 7, 1967. The jurisdiction of this Court is invoked under 28 United States Code, Annotated, Section 1257(3).

THE QUESTIONS PRESENTED

1. Does the Industrial Commission of Virginia have jurisdiction to consider the Petitioner's claim for benefits under The Workmen's Compensation Act for disabling injuries?

2. Was the dismissal of Petitioner's claim a denial of due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States?

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant provisions of the Constitution of the United States are set forth in the Appendices, *infra*, pp. A-9-10.

REASONS FOR GRANTING THE WRIT

The Industrial Commission acted arbitrarily in denying the minor Petitioner a continuance and dismissed his claim before the expiration of one year after the occurrence of the accidental injuries complained of. Section 65-84, Code of Virginia, requires that a claim be filed within one year after the accident, but does not require prosecution within one year after the accident. Accordingly, the Industrial Commission had jurisdiction to consider favorably Petitioner's Application for Rehearing. The denial of Petitioner's claim was a denial of due process of law.

CONCLUSION

Wherefore, it is respectfully requested that this petition for the writ of certiorari to the Supreme Court of Appeals of Virginia be granted.

ROBERT M. ALEXANDER
1829 Columbia Pike
Arlington, Virginia 22204
Attorney for Petitioner

APPENDICES

[Appendix A]

DEPARTMENT OF WORKMEN'S COMPENSATION
INDUSTRIAL COMMISSION OF VIRGINIA

WILLIAM DAVIS KENNEY
2440 South Kenwood Street
Arlington, Virginia
Plaintiff

vs.

MASON PANCAKE KITCHEN
a/k/a AUNT JEMIMA's KITCHEN
5248 Leesburg Pike
Alexandria, Virginia
(subsidiary)

PKI FOODS INC.
467 Sylvan Avenue
Englewood Cliffs, N. J.
(parent corporation)
and
Employer

SECURITY MUTUAL INSURANCE COMPANY
329 East 149th Street
New York, New York
Insurer

} Claim No. 797-081

PETITION FOR COMPENSATION – INJURY

The Employee above named, for his petition, states the following facts:

1. That on or about June 12, 1965, WILLIAM DAVIS KENNEY, Employee, was injured while in the employ of MASON PANCAKE KITCHEN, also known as AUNT JEMIMA's KITCHEN, 5248 Leesburg Pike, Alexandria, Virginia, a subsidiary of PKI FOODS INC., 467 Sylvan Avenue,

Englewood Cliffs, New Jersey, parent corporation, by an accident arising out of and in the course of his employment as a short order cook and kitchen helper.

2. That the character and extent of said injury was a serious and partial permanent disabling back and side injury, as well as other bodily injuries.

3. That on the date of said injury the Employer was duly insured against compensation liability by SECURITY MUTUAL INSURANCE COMPANY, 129 East 149th Street, New York, New York.

4. That no payment whatever has been made for compensation or other benefits.

5. That said Employer had due notice of said accident and injury, and demand for compensation and benefits on account thereof has been duly made.

6. That the weekly wage of said Employee was Eighty-Two Dollars ($82.00).

7. That Petitioner claims compensation and benefits against said Employer and Insurer on account of disability resulting from said accident, and medical and hospital expenses paid and expended and incurred by Petitioner to cure and partially relieve said injuries, consisting of the following as of this 26th day of June, 1965:

a. Jefferson Memorial Hospital
4600 King Street
Alexandria, Virginia

b. Dr. Tauber
Jefferson Memorial Hospital
4600 King Street
Alexandria, Virginia

WHEREFORE, Employee asks an award of the Commission against EMPLOYER and INSURER for compensation and benefits due said Employee on account of said injury,

as well as reasonable attorney's fees, as provided by the Compensation Law.

Respectfully submitted,

/S/ William Davis Kenney
Claimant

/S/ Robert M. Alexander
Attorney for Petitioner-Employee

[Certificate of Service dated June 27, 1965]

[Appendix B]

OPINION
BY HARWOOD, COMMISSIONER

Robert M. Alexander for the Claimant.
Norman F. Slenker for the Defendants.

Hearing before Commissioner HARWOOD at Alexandria, Virginia, on December 30, 1965.

This case, which is before us upon the claimant's application, is ordered dismissed and removed from the hearing docket for the failure of the claimant to appear and prosecute the case.

Leave is granted the claimant to reapply for a hearing if such application is made in writing and filed with the Industrial Commission within the time provided by § 65-84, Code of Virginia.

Dismissed, with leave to reinstate.

[Appendix C]

APPLICATION FOR REHEARING

Whereas this case was filed within the statutory period pursuant to Section 65-84, Code of Virginia, 1950, as amended,

and scheduled for hearing at Alexandria, Virginia, on November 16, 1965, but was continued, and scheduled for hearing in Alexandria, Virginia on December 30, 1965, and was dismissed and removed from the hearing docket for the failure of the claimant to appear and prosecute the case because he was at a place in Florida unknown to his counsel, and whereas the Claimant is now residing in the District of Columbia and available to press his claim herein, the Claimant, by counsel, moves the Commission to set the above styled cause on the hearing docket and to reinstate this case in every respect.

Further, Claimant restates his claim as follows:

1. Richmond Memorial Hospital, Richmond, Virginia	$ 203.90
2. Dr. Charles E. Sutton, Richmond, Virginia	140.00
3. Dr. Harry Brick, Richmond, Virginia	45.00
4. Richmond Community Hospital, Richmond, Virginia	397.50
5. Dr. John F. Kendrick, Richmond, Virginia	270.00
6. Jefferson Memorial Hospital, Alexandria, Virginia	627.46
7. Loss of earnings - 13 weeks @ $39 per week	507.00
Total	$2,190.86

Respectfully submitted,

/S/ William Davis Kenney,
by Counsel
Age 21, Date of Birth -
April 12, 1945
By counsel

/S/ Robert M. Alexander
Attorney for Claimant

[Certificate of Service]

[Appendix D]

OPINION
BY HARWOOD, COMMISSIONER

Robert M. Alexander for the Claimant.
Norman F. Slenker for the Defendants.

Hearing before Commissioner HARWOOD at Alexandria, Virginia, on September 29, 1966.

On June 28, 1965 William Davis Kenney, by counsel, filed an application for hearing alleging disabling injuries by accident arising out of and in the course of the employment by Pancake Kitchens, Inc. on or about June 12, 1965.

The claim came on to be heard at Alexandria on December 30, 1965. At that time Kenney was on a sojourn to Florida, and he, by counsel, moved for a continuance, to which the defendants, by counsel, objected and moved that the case be dismissed for failure to appear and prosecute the claim. The motions were taken under advisement, and on January 5, 1966 the following decision was rendered:

> "This case, which is before us upon the claimant's application, is ordered dismissed and removed from the hearing docket for the failure of the claimant to appear and prosecute the case.
>
> "Leave is granted the claimant to reapply for a hearing if such application is made in writing and filed with the Industrial Commission within the time provided by § 65-84, Code of Virginia.
>
> "Dismissed, with leave to reinstate."

On July 15, 1966, Kenney, by counsel, filed an "application for rehearing" to have the claim docketed and heard. The defendants, by counsel, promptly raised the issue of the Commission's jurisdiction, as the claim had not been filed with the Industrial Commission within one year after the alleged accident of June 12, 1965.

Section 65-84, Code of Virginia, which is jurisdictional, reads:

> "The right to compensation under this Act shall be forever barred, unless a claim be filed with the Industrial Commission within one year after the accident, and, if death results from the accident, unless a claim therefor be filed with the Commission within one year thereafter."

Kenney, born April 12, 1945, was 20 years of age on June 12, 1965, when the alleged accidental injury took place. Plainly, Kenney was *sui juris* under the Virginia Workmen's Compensation Act. See *Moon v. Western Union Telegraph Co.*, 7 OIC 129 (1925); *Humphrees v. Boxley Bros. Co.*, 146 Va. 91, 135 S.E. 890 (1926); *Wilson v. Hall Products, Inc.*,

Section 65-84, Code of Virginia, defining an employee specifically includes a minor. Also, see § § 65-33, 65-73, and 65-75, Code of Virginia.

The evidence clearly fails to show that Kenney was mentally incompetent within the meaning of that term as defined by the Supreme Court of Appeals of Virginia in *Rust Eng. Co. v. Ramsey*, 194 Va. 975, 76 S.E.2d 195 on or after December 30, 1965.

The record before us makes it unnecessary to comment upon the merits of Kenney's claim, for it is our holding that we are without jurisdiction. The decision of January 5, 1966 was clear and unequivocal, and the claim, not having been filed with the Industrial Commission within one year after the accident, is forever barred. The claim is

Dismissed..

[Appendix E]

PETITION FOR REHEARING OR REVIEW BEFORE THE FULL COMMISSION OR CERTIFICATION OF QUESTIONS OF LAW TO THE SUPREME COURT OF APPEALS

Comes now the Claimant, by counsel, and moves for a review of the Opinion of Commissioner Harwood dated November 16, 1966, adversely affecting him, and/or certification of the questions of law stated below, among other questions, to the Supreme Court of Appeals of Virginia:

1. Was Kenney's claim timely filed?

2. Was denial of a motion for a continuance by claimant proper?

3. As a minor without a legally recognized mental defect, did the original filing of his claim toll the statute of limitations until his 21st birthday?

Respectfully submitted,

/s/ William Davis Kenney,
Claimant

By Robert M. Alexander
Counsel

[Certificate of Service, dated November 28, 1966]

COMMISSION DECISION

Review before the full Commission at Richmond, Virginia, on January 4, 1967.

EVANS, Chairman, rendered the decision.

The full Commission on review concurs in the decision and award of the hearing Commissioner whereby the captioned matter was dismissed on the grounds that the Industrial Commission was without jurisdiction and adopt that opinion and award as that of the full Commission. Accordingly, that decision is affirmed and the case ordered stricken from the docket.

[Appendix F]

PETITION FOR APPEAL

To the Honorable Justices of the Supreme Court of Appeals of Virginia:

Comes now the Petitioner, William Davis Kenney, by counsel, for a Writ of Error in the matter of a Final Order entered against him by the full Industrial Commission on January 5, 1967, in Claim No. 797-082. The issue is whether the Petitioner timely filed a claim before the Commission for personal injuries sustained in the course and scope of his employment. At a scheduled hearing before the Commission after filing his Petition for a claim, Petitioner failed to appear in person, however, his counsel who was present moved for a continuance. The continuance was denied and an order was entered dismissing the original petition if the Claimant failed to refile within a one year period from the date of injury. Petitioner's request for a rehearing on the merits of his claim was filed within thirty days after the expiration of one year of the injury complained about. The Commission contends that it has no jurisdiction to decide this claim. To which rulings, the Petitioner takes exception and assigns error. Petitioner says that said rulings denied him as a minor due process of law both procedurally and substantively under the 14th Amendment of the Constitution of the United States and in effect compels him to not only file a petition for a claim, but to also prosecute his claim within a one year period from date of injury contrary to the intention of Section 65-84 of the Code of Virginia, as Amended. Petitioner waives oral presentation and prays adoption of this petition in lieu of an opening brief.

WHEREFORE, Plaintiff prays for appropriate relief in this cause.

Respectfully submitted,

William Davis Kenney,
Petitioner

/s/ Robert M. Alexander
Counsel

[Certificate of Service, dated February 4, 1967]

[Appendix G]

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 7th day of March, 1967.

The petition of William Davis Kenney for an appeal from an award entered by the Industrial Commission of Virginia on the 5th day of January, 1967, in a certain proceeding then therein depending, wherein the said petitioner was claimant and Pancake Kitchens, Inc., and another were defendants, having been maturely considered and a transcript of the record of the award aforesaid seen and inspected, the court being of opinion that the said award is plainly right, doth reject said petition, and refuse said appeal, the effect of which is to affirm the award of the said Industrial Commission.

A Copy,

Teste:

Clerk

[Appendix H]

Code of Virginia, 1950, As Amended.

Section 65-84. Time for filing claim – The right to compensation under this Act shall be forever barred, unless a claim be filed with the Industrial Commission within one year after the accident, and, if death results from the accident, unless a claim therefor be filed with the Commission within one year thereafter.

Constitution of the United States, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury. . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

Constitution of the United States, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which abridge the privileges or immunities of citizens of the United States; or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."